Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	MB Docket No. 98-204
	)	
	)	

To: The Commission

JOINT REPLY COMMENTS OF THE STATE BROADCASTERS ASSOCIATIONS

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of

Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations") by their attorneys in this matter, hereby file these Joint Reply Comments in response to the Commission's Further Notice of Proposed Rulemaking released July 26, 2021 in the above-captioned proceeding and certain of the Comments filed in response thereto.[1]

INTRODUCTION AND SUMMARY

The State Associations, along with the National Association of Broadcasters ("NAB"), have been long-time active participants in this and related proceedings before the Commission.[2]

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[1] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Further Notice of Proposed Rulemaking, MB Docket 98-204, FCC 21-88 ("*2021 Further Notice*") (rel. July 26, 2021).

[2] The State Associations hereby incorporate by reference those prior filings, including but not limited to, Joint Reply Comments of the State Broadcasters Associations in MB Docket 19-177 (filed Nov 4, 2019) ("*2019 State Associations Comments*"); Joint Reply Comments of the Named State Broadcasters Associations in Response to Public Notice in MB Docket 17-105 (filed Aug. 4, 2017); Comments of the Named State Broadcasters Associations on the Public Information Collection Submission of the Federal Communications Commission Regarding "The Broadcast Annual Employment Report" on FCC Form 395-B, OMB Control No. 3060-0390 (filed Sept 15, 2008); Joint Comments on Form 395-B in MM Docket 98-204 (filed May 22, 2008) ("*Joint Comments on Form 395-B*"); Joint Reply Comments of the Named State Broadcasters Associations in MM Docket 98-204 (filed August 9, 2004); Joint Petition for Reconsideration and/or Clarification in MM Docket 98-204 (filed July 23, 2004); Joint Petition for Reconsideration and Clarification in MM Docket 98-204 (filed Feb 6, 2003); Joint Reply

Throughout, they have expressed their support for the goals of diversity and inclusion in the broadcasting industry and of avoiding discrimination in broadcast employment. The State Associations and NAB have also been active proponents and leaders of industry initiatives to improve outreach, promote nondiscrimination in broadcast employment, and attract and train new leaders in the broadcast industry, particularly those from diverse backgrounds. However, the State Associations and NAB have also stood fast against efforts to reinstitute and enable regulatory practices found by the U.S. Court of Appeals to be unconstitutional in both the *Lutheran Church*[3] and *MD/DC/DE Broadcasters*[4] cases because those efforts impermissibly pressure broadcasters when making a hiring decision to achieve an FCC-favored outcome.

In the *2021 Further Notice*, the Commission seeks to refresh the record and reimpose the requirement that broadcasters file FCC Form 395-B on an annual basis, disclosing the race, gender, ethnicity and job category of each of their employees. The Commission again relies on Section 334 of the Communications Act as its authority to collect and disclose this data from radio and TV stations, but that section is in fact explicitly a limitation on the Commission's authority in this area, not a source of authority. As the State Associations have previously noted,[5] this outcome-oriented data-gathering, even when viewed in the most favorable light, hangs at the fringes of constitutionality, and the Commission should proceed with caution to

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Comments of the Named State Broadcasters Associations in MM Docket 98-204 (filed May 29, 2002); Joint Comments of the Named State Broadcasters Associations in MM Docket 98-204 (filed April 15, 2002).

[3] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 347-48 (D.C. Cir. 1998) ("*Lutheran Church"), rehearing denied*, 154 F.3d 487, *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

[4] *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 21 ("*MD/DC/DE Broadcasters*"), *rehearing denied* 253 F.3d 732 (D.C. Cir 2001), *cert denied sub nom. Minority Media and Telecommunications Council v. MD/DC/DE Broadcasters Assoc.*, 534 U.S. 1113 (2002).

[5] *2019 State Associations Comments* at 5-11.

avoid crossing that constitutional line or paving a path for others to do so. Indeed, it is clear from the comments filed in this proceeding that some are already clamoring to make improper use of this data (or are urging the FCC to do so), making apparent that merely gathering such data clears the way to future abuses.

Therefore, the State Associations support the Comments of NAB which note that, particularly on a publicly-available and station-attributable basis, collection of the Form 395-B data merely for statistical and potential Congressional reporting purposes cannot survive constitutional scrutiny as it does not serve a compelling government interest, nor is it sufficiently narrowly tailored to meet whatever government interest might be posited.[6] The State Associations therefore join with NAB in urging the Commission to consider less burdensome and more defensible alternatives.

Finally, should the FCC nevertheless proceed with collection of Form 395-B data, NAB is absolutely correct that the data should only be disclosed, if at all, on a basis that is not station-attributable, and that the mechanisms enabled by the Confidential Information Protection and Statistical Efficiency Act of 2002 ("CIPSEA")[7] be utilized to provide the Commission with the means to keep such information confidential.[8]

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[6] Comments of National Association of Broadcasters in MB Docket 98-204 (filed September 30, 2021) ("*NAB Comments*") at 11.

[7] 44 U.S.C. §3651 *et al.*

[8] *NAB Comments* at 17-22.

I. The Commission Cannot Justify Reinstatement of the Form 395-B Based on a Congressional Mandate that Pre-Dates the *Lutheran Church* Decision

In the *2021 Further Notice*, the Commission again asserts that Section 334 of the Communications Act mandates that it collect and disclose on a station-attributable basis Form 395-B data from broadcast stations,[9] when that section is explicitly a limitation on, rather than a grant of, FCC authority in the area of EEO regulation.[10] In fact, Congress took the extraordinary step of detailing in Section 334(c) the *only* circumstances under which the FCC would be permitted to make any alteration to its soon-to-be-found unconstitutional EEO regulations. The text of Section 334(a) states that "[e]xcept as specifically provided in this section, the Commission shall not revise" its EEO forms and regulations, and then Section 334(c) sets the

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[9] *2021 Further Notice* at 2-3, ¶¶ 2-3.

[10] Indeed, it is difficult to ignore that the most prominent word in Section 334 is "Limitation":

> Limitation on revision of equal employment opportunity regulations
>
> (a) Limitation
>
> Except as specifically provided in this section, *the Commission shall not revise—*
>
> (1) *the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. 73.2080) as such regulations apply to television broadcast station licensees and permittees*; or
>
> (2) the forms used by such licensees and permittees to report pertinent employment data to the Commission.
>
> (b) Midterm review
>
> The Commission shall revise the regulations described in subsection (a) to require a midterm review of television broadcast station licensees' employment practices and to require the Commission to inform such licensees of necessary improvements in recruitment practices identified as a consequence of such review.
>
> (c) Authority to make technical revisions
>
> The Commission may revise the regulations described in subsection (a) *to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization*.

47 U.S.C. § 334 (emphasis added).

bounds of that limited exception, which is "to make *nonsubstantive* technical or clerical revisions in such regulations *as necessary to reflect changes in technology, terminology, or Commission organization.*"[11] The courts' rulings in *Lutheran Church* and *MD/DC/DE Broadcasters*, pursuant to which the FCC abandoned Form 395-B and adopted new outreach-based rules 20 years ago, were none of those three things. Had Congress wanted to include "or if such regulations become unenforceable" to its list of exceptions, it could have done so, but did not. Nor has it amended Section 334 in the decades since to insert such a modification.

The FCC simply cannot have it both ways. Either the *2021 Further Notice*'s assertion that Section 334 is still in force and dictates reinstatement of the Form 395-B is correct, in which case the FCC's current EEO rule violates that provision and is unenforceable, or Section 334 was effectively neutered by the *Lutheran Church* and *MD/DC/DE Broadcasters* courts because it forces the FCC to enforce unconstitutional regulations and associated forms, in which case it cannot be the basis now for insisting that the Form 395-B be reinstated.

Despite this, the *2021 Further Notice* asserts that "[i]mportantly, neither *Lutheran Church* nor *MD/DC/DE Broadcasters* invalidated the Congressionally mandated data collection of employment data or making the data available to the public."[12] That is incorrect.[13] The

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[11] 47 U.S.C. § 334(a) and (c) (emphasis added).

[12] *2021 Further Notice* at 7, ¶ 12. *See also Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Report and Order and Third Notice of Proposed Rule Making, 17 FCC Rcd 24018, 24022 (2002).

[13] The State Associations' Joint Reply Comments in the Commission's 2019 *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries* proceeding (34 FCC Rcd 5358 (2019)) painstakingly traced the history of the two cases, setting out which questions the courts answered and which they left unanswered, noting that "[th]e FCC took the DC Circuit's restraint in declining to reach the issue of whether the FCC had authority to promulgate *any* EEO Rule as evidence that it in fact does have such authority," despite the fact

Lutheran Church court found that the public availability of Form 395-B data was integral to unlawfully pressuring broadcasters to recruit and hire based on race under the first of the FCC's EEO rules, and called that fact out, saying with regard to such employee data, "[t]he risk lies not only in attracting the Commission's attention, but also that of third parties."[14] Moreover, the *MD/DC/DE Broadcasters* court specifically questioned the Commission's counsel at oral argument why the FCC could not collect the Form 395-B data in a manner that was not station-attributable, clearly evidencing that court's grave concern with the FCC's then-existing practice.[15]

Where the principal basis for invalidating the FCC's prior EEO rules was that they explicitly and implicitly pressured broadcasters to make hiring decisions based on race and gender by comparing the racial and gender makeup of a station's workforce to that of the local population, it is pretty hard to argue that the Form 395-B—the sole informational tool that made such improper and unconstitutional pressure possible—is not the most important and integral component of that unconstitutional regulatory scheme. In addition, as the State Associations explained in 2008:

> it is important to note that while Section 634 of the Communications Act requires the cable operators to file annual statistical reports 'identifying by race, sex, and job title the number of employees' in certain job categories, there is no comparable statutory requirement applicable to broadcast stations. Indeed, there is no statute *at all* mandating that broadcast stations submit to the Commission the race, ethnicity, and gender of their employees on any FCC form. This is yet further evidence that the public filing of

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that "the court had already called the Commission's authority into question in *Lutheran Church* and did not reach the question in *MD/DC/DE Broadcasters*." *2019 State Associations Comments* at 6-11.

[14] *See Lutheran Church,* 151 F.3d at 353.

[15] *See* Joint Reply Comments of the Named State Broadcasters Associations in MM Docket 98-204 (filed August 9, 2004) at 5.

staffing profiles, on a station-attributed bases, is not necessary to achieve a legitimate governmental interest.[16]

Lacking a statutory basis for reinstating Form 395-B data collection for broadcast stations, the *2021 Further Notice* resorts to citing a congressional finding in the *1992 Cable Act* that "increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media."[17] However, the *Lutheran Church* court explicitly rejected that rationale, saying "our opinion has undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity."[18]

II. Collection and Disclosure of Form 395-B Data Will Impermissibly Insert the FCC Into Broadcasters' Employment Decisions

As the *NAB Comments* note, the *2021 Further Notice* "provides no evidentiary support for why such a data collection is necessary or how it will help further the goal of increased diversity in the broadcasting industry."[19] The Commission, for its part, has previously stated that

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[16] *Joint Comments on Form 395-B* at 8 (*citing* Section 634(d)(3)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 554(d)(3)(A)) (emphasis in original). The *2021 Further Notice* asks how the language of Section 554 of the Act requiring that MVPDs make this data publicly available at their locations affects broadcasters. *2021 Further Notice* at 8, ¶ 14. As the State Associations explained in 2008, it does not affect broadcasters at all, as it explicitly does not apply to broadcasters. *Joint Comments on Form 395-B* at 8. Moreover, the distinction is a logical one, as the Commission does not hold the "life and death power" over cable operators that it holds over broadcast station licensees, reducing the constitutional impact of collecting employee data from cable operators. *See MD/DC/DE Broadcasters,* 236 F.3d at 19.

[17] *2021 Further Notice* at 3, ¶ 3 (*citing* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 § 22, 106 Stat. 1460 (1992) (*"1992 Cable Act"*)).

[18] *Lutheran Church,* 151 F.3d at 356.

[19] *NAB Comments* at 2.

it will only use Form 395-B data for statistical and reporting purposes.[20] Given that the sole report mandated by Section 22(g) of the *1992 Cable Act* was delivered almost 30 years ago,[21] and "the form has been suspended for approximately two decades, during which time the FCC has effectively fulfilled its statutory obligations regarding EEO and vigorously enforced its EEO rules,"[22] the need to collect and disclose this information now is not evident. As commenters NAB and Center for Workplace Compliance ("CWC") each note, the Form 395-B data is duplicative of EEO-1 data already confidentially collected by the EEOC, such that "the FCC can achieve its stated goals without resuming data collection on Form 395-B."[23]

In addition to the aggregate reports produced by the EEOC referred to by CWC, to the extent the Commission feels aggregate broadcast industry employment data would be useful to some permissible FCC endeavor, the State Associations note that what would likely be the most pertinent data, the aggregate employment data for broadcast TV and radio newsrooms, including news management, is already collected and published on an annual basis by RTDNA, one of the most respected organizations in the field.[24] Using such privately-collected data would be vastly

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[20] *2021 Further Notice* at 4, ¶ 6 (*citing Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies,* Memorandum Opinion and Order, 15 FCC Rcd 22548, 22559, ¶ 37 (2000) ("The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress.").

[21] *See Implementation of the Commission's Equal Employment Opportunity Rules,* Report, 9 FCC Rcd 6276 (1994).

[22] *NAB Comments* at 18.

[23] Comments of Center for Workplace Compliance in MB Docket 98-204 (filed September 30, 2021) at 6 (title capitalization omitted). *See also NAB Comments* at 2-3.

[24] *See, e.g, Research: Local News Diversity Reaches Records, But Representation Gap Shrinks Slowly*, (June 23, 2021) available at (https://www.rtdna.org/article/research_local_news_diversity_reaches_records_but_representation_gap_shrinks_slowly) (last visited October 29, 2021).

more efficient—both from the FCC's perspective and that of every radio and television station that would otherwise be filing a Form 395-B under threat of sanction for failure to do so—while avoiding the constitutional and judicial issues otherwise faced by the Commission. It would also resolve the concerns raised in the *2021 Further Notice* about the Commission's ability to keep individual station employee data confidential if the FCC collects it.

Otherwise, the collection and particularly the public release on a station-attributable basis of the Form 395-B data would impermissibly insert the FCC into broadcasters' employment decisions, pressuring them to make race- and gender-based decisions, a fact that the *2021 Further Notice* and various commenters in this proceeding do not acknowledge. In adopting its pledge to not use Form 395-B data for purposes other than trend reporting, the Commission stated that "[s]ince we are legally obligated to comply with our own rules, this should put to rest the concerns of even the wariest broadcaster."[25] Similarly, in the Commission's 2019 *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries* proceeding, the EEO Supporters inexplicably asserted that: "Our proposals on the use of Form 395 data are not constitutionally controversial."[26]

However, broadcasters' concerns about reinstatement of the Form 395-B are not based on mere hypotheticals and speculation. Those who have been at the FCC long enough will readily recall when it was routine for petitions to deny to be filed against scores if not hundreds of stations at a time as stations in each state came up for renewal, with such petitions citing no evidence other than a comparison of each station's Form 395-B data against the racial, ethnic and

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[25] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Memorandum Opinion and Order, 15 FCC Rcd 22548, 22560, ¶ 40 (2000).

[26] Comments of the EEO Supporters in MB Docket 19-177 (filed Sept. 20, 2019) ("*2019 EEO Supporters Comments*") at 29.

gender breakdown of the population in the station's market. Regardless of outcome or any penalties imposed, each station's license renewal was delayed, often for years, as the Commission's staff struggled to process these "data dump" petitions and then draft orders responding to them with regard to each challenged station application. In the meantime, those stations would struggle to stay in business as banks refused to lend to them—including refinancings—while a cloud hung over their license renewal.

Similarly, all transactions for such stations were frozen pursuant to the FCC's *Jefferson Radio* doctrine,[27] under which the FCC will not approve assignment and transfer applications until after a station's pending license renewal application is granted. As a result, the licensee couldn't borrow money for station working capital, nor could it sell its cash-starved station, all the while suffering the crushing uncertainty as to when this ordeal would end. It was for this reason that the court in *Lutheran Church* noted that unconstitutional pressures don't come solely in the form of FCC fines and enforcement proceedings:

> A regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The Commission in particular has a long history of employing:
>
> > a variety of *sub silentio* pressures and "raised eyebrow" regulation of program content. . . . The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry . . . all serve as means for communicating official pressures to the licensee.[28]

It is therefore easy to see why even the most ardent advocate of the FCC's current EEO rule and objectives should have serious concerns about the reinstatement of the Form 395-B.

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[27] *Jefferson Radio Corp. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

[28] *MD/DC/DE Broadcasters*, 236 F.3d at 19 (*quoting Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (en banc)).

Those concerns only increase where station-attributable data becomes available to third parties, whether because the Commission permits it, or third-party legal actions seek to compel it, once the FCC is in possession of that data. While the FCC has added a Note to its rule containing a pledge not use the Form 395-B data in certain ways, it is equally true that the Commission is permitted to waive its rules where it believes the public interest requires it. So such a statement is cold comfort for broadcasters, and merely invites third-parties to present the Form 395-B data in tandem with a public interest argument as to why the Commission should waive its rule and use the data against the station. The licensee then has to expend its resources defending itself and opposing the requested rule waiver, meaning that even if the Commission ultimately rejects the invitation to waive the rule, the licensee has been put through a costly and stressful process that any rational business owner would go to great lengths to avoid.[29]

And in that regard, numerous proposals have already been made in this docket by various parties to actually expand the Commission's enforcement activities which rely on the data found in a Form 395-B. In the Commission's 2019 *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries* proceeding, the State Associations responded to one such proposal as follows:

> Thus, the EEO Supporters propose that the FCC abandon its blanket prohibition on relying solely on Word of Mouth recruiting, and once the FCC has determined that a station has relied solely on Word of Mouth recruiting, require the station to complete and submit a Form 395 detailing the racial and gender breakdown of its staff.[30] From the information submitted on the Form 395, the FCC would then determine whether the station is a discriminator because its staff is homogenous, or not a discriminator because its staff is comprised of some undefined mix of races and genders. The Form 395, then, becomes the arbiter of whether the station has on staff "enough" employees of particular

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[29] *See, e.g.*, *MD/DC/DE Broadcasters*, 236 F.3d at 21 ("Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.").

[30] *2019 EEO Supporters Comments* at 16.

> races or genders to not be punished by the FCC. This is the very definition of an unconstitutional racial quota. . . . This disparate treatment of broadcasters based on the racial and gender composition of their staff would not only be a race-based rule subject to strict scrutiny in court, but is precisely the type of "quota-based" approach to EEO that was struck down in both *Lutheran Church* and *MD/DC/DE Broadcasters* as blatantly unconstitutional.[31]

Private parties have also stated their intention to use the Form 395-B data in ways that will necessarily pressure broadcasters to make preferential hiring and employment decisions. In 2002, the Minority Media and Telecommunications Council ("MMTC") and 47 other organizations stated that they intended to "liberally draw interferences from statistics" to determine whether stations were "discriminators," and presume discrimination is occurring where a statistical analysis shows that a station's employment profile differs from the local market by two standards deviations.[32] In 2004, MMTC, the National Organization for Women and others in their comments touted public disclosure of Form 395-B data as a preventative for discrimination and quoted Professor Cass Sunstein's statement made in connection with a proposal that broadcasters publicly disclose their public service and public interest activities: "[A] disclosure

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[31] *2019 State Associations Comments* at 18-19. In this proceeding, the EEO Supporters reiterate this proposal, claiming use of employment profile data is "hornbook" law in discrimination review and that:

> As the Commission has long held, excessive use of word-of-mouth recruitment by members of a station's homogeneous staff is inherently discriminatory and could be disqualifying. If such a case arises, one piece of evidence that should be available to the Enforcement Bureau staff is data on the racial and gender composition of those whose "mouths" are doing the "word of mouth" recruitment. Broadcasting must not become the only industry in the country that is immune from the obligation to produce data that is useful to a finder of fact in determining whether an employer may have engaged in a discriminatory scheme.

Comments of the EEO Supporters in MB Docket 98-204 (filed Sept. 29, 2021) ("*2021 EEO Supporters Comments"*) at 3-4 (footnotes omitted).

[32] Joint Comments of the Named State Broadcasters Associations in MM Docket 98-204 (filed July 29, 2004) at 5.

requirement will by itself trigger improved performance, by creating a kind of competition to do better, and by enlisting various social pressures in the direction of improved performance."[33]

The history here is clear. If the Commission puts the Form 395-B data in the public domain, third parties will use it, and that use will impermissibly pressure broadcasters in making employment decisions. As the State Associations noted in their *2019 State Association Comments*:

> [B]y now it should be obvious that, if stations are required to submit to the FCC information on their racial and gender profiles, particularly given the Commission's past practice of then using that information to assess a station's suitability for punishment, stations may reasonably feel unconstitutional pressure to make race-based hiring decisions. Even if that were not the case, if those profiles are made public, they will be open to scrutiny by third parties who, assisted by the government's forced disclosure of that information, will then file complaints at the FCC asserting the need for investigations or enforcement actions. This risk of being subjected to FCC investigations, whether there is in fact anything to find or not, impermissibly pressures broadcasters to hire preferentially so as to avoid such expensive and draining proceedings, which in turn may have to be reported to their lenders under loan covenants, creating increased risk to a station's financing or its ability to secure refinancing.
>
> Imposing such pressures, intentionally or not, cannot withstand strict scrutiny. The Commission has previously asked whether the fact that it publicly released data from the Form 395 prior to the *Lutheran Church* case dictates that it should continue doing so if it resumes collecting that data. There is a clear distinction that mandates that the answer to this question be a resounding "no." Prior to the *Lutheran Church* case, the FCC used statistical analysis of individual stations' staff compositions to identify stations to investigate, and private parties filed petitions to deny stations' license renewal applications citing nothing but the data in a station's Form 395. Before the Commission's practice was struck down, third parties' access to and use of the Form 395 data was consistent with the FCC's own use of that data, which the FCC believed was permissible. If the Commission were to revert to its prior practice, it would put itself in a completely untenable position, effectively outsourcing to private parties the task of imposing racial and gender quotas on broadcasters. The FCC simply cannot act on a complaint brought by a third party based on racial breakdowns of station staff where the Commission itself could not bring such an action.[34]

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[33] Comments of NOW in MM Docket 98-204 (filed July 29, 2004) at 6.

[34] *2019 State Associations Comments* at 28-29 (footnotes omitted).

Against this backdrop, the *2021 Further Notice* asks what additional steps the Commission should take to assure that the Form 395-B data is only used for the Commission's stated purposes of monitoring trends and reporting to Congress.[35] Sadly, there are none. Once released to the public on a station-attributed basis, the Commission has no control over what third parties do with this information. Moreover, if stations must keep the filed Forms 395-B in their Public Inspection Files, which are now maintained online, those third parties will have worldwide access, 24 hours a day, 7 days a week, to a total of eight years' worth of such data, and the ability to use big data techniques to scrape and manipulate it.

And it should be remembered that this will not be the only data available in the Public Inspection File. The current version of the FCC's EEO rule requires that broadcasters place a vast amount of other employment practices data in their online Public Inspection File on an annual basis and maintain it for their eight-year license term: the number of hires per year, recruitment sources used for each hire, the number of interviewees referred by each source, and a showing of compliance with the FCC's non-vacancy specific recruitment initiatives.[36] Adding the Form 395-B data to this trove of information inexorably leads one to the same conclusion that the *MD/DC/DE Broadcasters* court reached regarding Option B; namely that by collecting and disseminating station employment profile information, the FCC makes clear that "the agency with life and death power over the licensee is interested in results, not process, and is determined to get them."[37]

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[35] *2021 Further Notice* at 8, ¶14.

[36] 47 C.F.R. § 73.2080.

[37] *MD/DC/DE Broadcasters,* 236 F.3d at 19.

At a minimum, taken together, the Form 395-B and annual EEO Public Inspection File Report information required under Section 73.2080(c) of the current EEO rule constitute a dossier of employment and employee information far more vast and invasive than anything reviewed by the courts in the *Lutheran Church* or *MD/DC/DE Broadcasters* cases, and most assuredly will not be seen as narrowly tailored to the Commission's stated government interest in "trends and reporting."

III. Should the FCC Reinstate the Form 395-B, It Must Maintain Confidentiality

If, despite the obstacles discussed above, the Commission concludes it has authority to reinstate the Form 395-B, it is imperative that the data be held and utilized in an aggregate form, and that station-attributable data in particular not be made publicly available if the Commission hopes to thread the constitutional and statutory needle it faces. In that regard, the State Associations take note of the analysis in the *NAB Comments* suggesting that the FCC would be able to take advantage of the mechanisms available through CIPSEA as a means of at least avoiding public disclosure of the data.[38] While the agency as a whole may not meet the definition of a "statistical" agency under CIPSEA, a necessary step if data might be handled by the agency's contractors, it appears there is a method by which the Commission can have a unit within it, such as the Office of Economics and Analytics, qualified to meet that definition, as well as other measures that could be taken to alleviate the Commission's concern about its ability to continue to use contractors while complying with CIPSEA.[39]

[38] *See generally NAB Comments* at 18-21.
[39] *Id*. at 21.

In addition, the *2021 Further Notice* asks for examples of existing filing approaches that would allow the Commission to confirm that a licensee has met its filing obligation without disclosing the content of the filing to the Commission or the public.[40] With respect to that point, the State Associations note that the Commission's own LMS filing system appears able to shield exhibits attached to electronically-filed forms from public view. Specifically, invoices attached to the Form 399 filed by broadcasters seeking reimbursement of repack-related expenses can be seen by the filer, but not by the public. This functionality may already extend or have the capability to be extended to FCC personnel, potentially addressing that concern.

As the discussion above makes apparent, collection of the Form 395-B data raises myriad constitutional and statutory issues. If, despite those, the Commission decides to seek reinstatement of the form, it must at a minimum ensure that the resulting requirement is narrowly tailored to reduce the burdens and pressures outlined above. Avoiding the public disclosure of the Form 395-B data is an important first step towards meeting that imperative.

CONCLUSION

As there is in fact no requirement to report aggregate broadcast station employment data to Congress, nor authorization for the FCC to collect it in the first place, and because the FCC has not otherwise enunciated a permissible government interest in collecting such information, particularly when the most relevant employment information is already available in aggregate form from private sources that do not create the significant constitutional and legal issues that any proposal to reinstate the Form 395-B necessarily raises, the Commission should decline here

[40] *2021 Further Notice* at 9, ¶ 17.

to take any such action. Should it nevertheless push forward with such a filing obligation, it must, at a minimum, assure that the confidentiality of the data collected is preserved.

Respectfully submitted,

THE STATE BROADCASTERS ASSOCIATIONS

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